## APPENDIX A.

### Statutes and Rules Involved.

Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. 78j) provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> * * * *
>
> "To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

In promulgating Rule 10b-5 thereunder, the Commission provided (17 C. F. R. 240.10b-5):

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(1) to employ any device, scheme, or artifice to defraud.
>
> "(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

The jurisdictional provisions of Section 27 (15 U. S. C. 78aa) provide:

"The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duly created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ."

## APPENDIX B.

### Decisions Below.

United States District Court-District of Hawaii Nov. 28, 1960 (190 Fed. Supp. 21).

Tavares; District Judge.

A verified complaint was filed praying that the defendant "be enjoined and restrained permanently and during the pendency of this action" from holding a special stockholders' meeting scheduled to be held on November 29, 1960, and from using proxy material in the form attached to the complaint, and from using the proxies obtained by the defendants, and asking that the proxies "be impounded by this Court." Attached to the complaint was a motion for preliminary injunction.

The proxy material attached to the complaint consists of 68 printed pages compiled under various headings, among others, General Information, Purposes of the Meeting, Reasons for the Plan of Reorganization, Material Features of the Proposed Plan of Reorganization, Rights of Dissenting Stockholders, Stock Exchange Listing, History and Business of American Factors, Limited, Executive Stock Option Plan, History and Business of Pioneer Mill Company, Limited, History and Business of Oahu Sugar Company, Limited; it contains financial statements of each of the above corporations certified by opinions of independent Public Accountants, copies of the Agreement of Merger, copies of Amended Articles of Association of American Factors, Limited, copies of an Appraisal Report by a committee consisting of George M. Collins, Ralph B Johnston and Richard W. Kellett.

The alleged basis of jurisdiction is that the action arises under Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78n(a)). By oral amendment allowed in open court this was amended to also embrace Section 10 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78j and Rule X-10B-5 (C.F.R. § 240.10b-5)), and jurisdiction was claimed under the provisions of Section 27 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78aa).

Defendants filed a return to the motion for preliminary injunction in which they denied jurisdiction of the Court over the subject matter; averred that the complaint fails to state a claim upon which relief can be granted; averred that indispensable parties have not been joined; averred that the complaint was without equity; that the plaintiff is seeking by this action to secure for herself preferential treatment and that she does not come into this Court with clean hands; averred that exclusive remedy is provided by statute of the State of Hawaii. Attached to the return was an affidavit of the Vice President of Pioneer Mill Company, Limited. The affidavit sets forth generally facts to sustain the return and denies all wrongdoing alleged in the complaint.

The pertinent part of the affidavit referring to the jurisdiction reads: "that the capital stock of said corporation is not now and has never been registered pursuant to the Securities Act of 1934 on any national securities exchange." In the proxy statement attached to the complaint appears the following statement: "The Capital Stock of American Factors, Limited distributable as a result of the merger is listed but not registered on the Honolulu Stock Exchange and is traded though

unlisted on the San Francisco Division of the Pacific Coast Stock Exchange."

The plaintiff introduced no evidence as to jurisdiction, and the taking of evidence on the remaining issues including that of unclean hands was held unnecessary by the Court. There has been filed in the cause as court exhibits an order of the Securities and Exchange Commission dated November 5, 1935 exempting the Honolulu Stock Exchange from registration under the provisions of the Securities Exchange Act of 1934 as a national securities exchange and an order dated March 6, 1943, the effect of which is to provide specifically that Section 14 of the Securities Exchange Act relating to proxy solicitation shall not be applicable to issuers of stock on the Honolulu Stock Exchange. As evidence of her good faith the plaintiff showed the Court that in the Hawaiian Securities Manual, a publication circulated generally in Hawaii, appeared the language under *Pioneer* Mill Company, Limited as follows: "Stock Listed: Honolulu Stock Exchange and Pacific Coast Stock Exchange, Unlisted trading."

There seems to be no dispute that the stock of Pioneer Mill Company, Limited is in fact traded as an unlisted security of the San Francisco Division of the Pacific Coast Stock Exchange. It is also not disputed that the stock has never been listed on the Pacific Coast Stock Exchange.

After the question of jurisdiction had been submitted, the Court denied a motion by the plaintiff to amend the complaint in open court which would add, in the alternative, a prayer for rescission of the merger contract if approved at the stockholders' meeting.

On the basis of the record made herein the Court makes the following findings of fact and conclusions of law:

1. That the capital stock of said corporaton has been and is now listed on the Honolulu Stock Exchange.

2. That the capital stock of the corporation has not been registered pursuant to the Securities Exchange Act of 1934 on the Honolulu Stock Exchange.

3. That the capital stock of said corporation is not now and has never been listed on the Pacific Coast Stock Exchange.

4. That the capital stock of said corporation is not now and has never been registered pursuant to the Securities Act of 1934 on the Pacific Coast Stock Exchange.

5. That the capital stock of said corporation is admitted to unlisted trading privileges on the Pacific Coast Stock Exchange.

6. That the Honolulu Stock Exchange has been exempted by order of the Securities and Exchange Commission dated November 5, 1935, as amended by order dated March 6, 1943, from registration under the provisions of the Securities Exchange Act of 1934 as a national securities exchange.

7. That pursuant to the provisions of Rule X-12F-4 adopted by the Securities and Exchange Commission August 29, 1934, and amended by amendments issued March 16, 1935, December 15, 1935 (see, par. 25,554 of the CCH Federal Securities Law Reporter), the Securities and Exchange Commission has specifically provided that any security for which unlisted trad-

ing privileges on any national securities exchange have been continued or extended pursuant to Section 12(f) (15 U.S.C.A. § 78l) shall be exempt from the operation of Section 14 unless such security is also registered as a listed security on any other national securities exchange.

8. That the solicitation of proxies by the defendants was for the purpose of effecting a corporation reorganization in accordance with the provisions of the Corporation Law of the State of Hawaii permitted by Chapter 173, Revised Laws of Hawaii 1955, as amended, and not for the purpose of effecting a purchase or sale of any security.

Conclusions of Law

1. That the Court has no jurisdiction over the subject matter of this suit arising under the provisions of *Section 14(a) of the Securities Exchange Act of 1934*, 15 U.S.C.A. § 78n(a).

2. That the Court has no jurisdiction over the subject matter of this suit arising under the provisions of Section 10 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j as implemented by Rule X-10B-5 (17 C.F.R. § 240.10b-5).

Wherefore, it is ordered that the complaint herein be and the same hereby is dismissed with costs to the defendants.

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United States Court of Appeals for the Ninth Circuit.

Appeals from the United States District Court for the District of Hawaii.

Before: Chambers, Barnes, Hamley, Hamlin, Jertberg, Merrill, Koelsch, Browning and Duniway, Circuit Judges.

Duniway, Circuit Judge:

There are before us an appeal from a judgment dismissing a complaint and a motion to dismiss the appeal. We have concluded that the motion should be granted.

Jurisdiction below was predicated upon Sections 14-(a) and 10 of the Securities Exchange Act of 1934, 15 U. S. C. §§78n(a) and 78j and Securities and Exchange Commission Rule X-10B-5 (17 C. F. R. §240, 10b-5). We have jurisdiction under 28 U. S. C. §1291.

Appellees motion is based upon a claim that the matter is moot, and we agree. The pertinent facts, stated in chronological order, begin on October 12, 1960, with the circulation of a notice of a special meeting by a Hawaiian corporation, Pioneer Mill Company, Ltd. (Pioneer), to its stockholders. This was accompanied by a 68 page printed proxy statement relating to a proposed plan of reorganization whereby stock of Pioneer would be exchanged for stock of another Hawaiian corporation, American Factors, Limited. (American) in the ratio of 1 to 1.1. The plan contemplated the merger of Pioneer with American. The statement was accompanied by a proxy and a letter from Pioneer's president recommending the proposal. A second letter, from the Vice President and also recom-

mending the proposal, was sent on October 26. The meeting was called for the morning of Tuesday, November 29.

On November 21, appellant, a stockholder of Pioneer, filed this action. She named as defendants Pioneer and its officers and directors, but not American. She alleged that American owned 57.4% of the stock of Pioneer and that some of the individual defendants were officers or directors of American. She then alleged that the proxy statement was false and misleading in certain material respects, and was circulated in violation of Section 14(a), supra. The prayer was that the defendants be enjoined from holding the contemplated meeting of November 29, from using the proxy statement or any other misleading statement and from using any proxies obtained by use of the statement, and for further relief. There was no prayer that the proposed merger be enjoined, nor would this have been appropriate in an action to which American was not a party.

Accompanying the complaint was a motion for a preliminary injunction, by which the same relief was asked, pendente lite, the motion being noticed for November 25, a Friday. On that day, appellee filed a "return," asserting, among other things, lack of jurisdiction, failure to join indispensable parties (the stockholders who had signed proxies), unclean hands, and want of equity.

A hearing was had, at which it developed that Section 14(a) of the Securities and Exchange Act (15 U. S. C. §78n(a)) did not apply because the stock was not listed on any national securities exchange. Appellant then asked and was granted permission to amend her complaint to allege that jurisdiction was also based upon Section 10 (15 U. S. C. §78j). The court

indicated that it doubted that it had jurisdiction, but took the matter under submission until the following Monday, November 28. On that day, it held that it did not have jurisdiction. At the Monday hearing, appellant asked leave to amend her complaint by adding to the prayer a demand that, if the merger should receive a favorable vote, it be rescinded. The motion was denied, as was the motion for preliminary injunction, and judgment of dismissal followed.

The motion to dismiss the appeal shows that the November 29 meeting was held and the merger was approved and has been completed. It also shows that, pursuant to Revised Laws of Hawaii, 1955, Sec. 173-19, Appellant, as a dissenting shareholder, has demanded that she be paid the fair market value of her shares. It is claimed that she thereby lost her status as a shareholder (Rev. Laws, 11aw, §173-20) and can no longer maintain this action. The motion also shows, however, that she made her demand solely because of the time limit specified in the Hawaiian statute, and under protest. We do not pass upon the question as to whether she thereby lost her right to proceed with this action (Compare Ramsburg v. American Investment Company of Illinois, 7 Cir., 1956, 231 F. 2d 333 with Beechwood Securities Corporation, Inc. v. Associated Oil Co., 9 Cir., 1939, 104 F. 2d 537), because the motion to dismiss should be granted upon other grounds.

The original purpose of the action is clear—to prevent the use, at the meeting of the stockholders of Pioneer, of proxies solicited by means of a proxy statement claimed to be misleading. The idea of a rescission of the merger is obviously an afterthought of Appellant or her counsel. American, the other party

to the merger, was not named as a defendant, nor did appellant ask leave to join it. Obviously, it was a necessary party in any attempt to prevent the merger, and it is difficult to believe that its omission was inadvertent. In short, since the purpose was to prevent the meeting, or the use of the proxies at the meeting, since both of those things have happened, and since the present action is not an appropriate vehicle for an attack upon the merger, the action has become moot. (Sobel v. Whittier Corp., et al., 6 Cir., 1952, 195 F. 2d 361; Kelaghan v. Industrial Trust Co., et al. 1 Cir., 1954, 211 F. 2d 134; Fink v. Continental Foundry & Machine Company, 7 Cir., 1957, 240 F. 2d 369). As is pointed out in *Fink,* Ramsburg v. American Investment Company of Illinois, supra, 7 Cir., 1956, 231 F. 2d 333 is not in point because there both parties to the merger were before the court. Not so in *Sobel, Kelaghan* or *Fink*; not so here.

We think that, in order to make it clear that the judgment appealed from is not res judicata as to the validity of the merger, the proper course is that followed in *Kelaghan,* supra. The matter is remanded to the District Court with directions to vacate the judgment and dismiss the complaint without prejudice.

(Endorsed) Opinion Filed March 14, 1962.

Frank H. Schmid, Clerk.